PO-24110

Ombudsman's Determination

Applicant	Mrs G
Scheme	NHS Injury Benefit Scheme
Respondent	NHS Business Services Authority (**NHS BSA**)

Complaint Summary

Mrs G's complaint is that NHS BSA has taken the wrong approach in reaching its decision not to award her a permanent injury benefit (**PIB**).

Summary of the Ombudsman's Determination and reasons

The complaint shall be upheld against NHS BSA because it failed to consider the matter of Mrs G's eligibility for an injury benefit in the manner intended by the Courts.

Detailed Determination

Material facts

1. Mrs G applied for a PIB, in August 2011, on the grounds that she was suffering from neck and back pain as a result of an incident at work on 16 February 2010. On that date, Mrs G had experienced pain in her neck and lower back while attending to a patient (the **Index Injury**).

2. Mrs G's application was declined and she unsuccessfully appealed. Having not succeeded with her appeals under the Scheme's internal dispute resolution (**IDR**) procedure, Mrs G applied to the Pensions Ombudsman (**TPO**). The then Ombudsman issued a Determination (*PO-582*) on 29 May 2013. He upheld Mrs G's complaint and directed NHS BSA to:

> "consider whether [Mrs G's] work injury on its own (that is, disregarding normal age related degeneration) has caused her to suffer a permanent reduction in her earnings ability of more than 10%."

3. NHS BSA reconsidered Mrs G's PIB application. It concluded that the Index Injury had not, on its own, resulted in a permanent loss of earning ability (**PLOEA**) of more than 10%. Mrs G submitted further appeals under the IDR procedure which were unsuccessful. She made a further application to TPO. On 28 November 2014, the then Deputy Ombudsman issued a Determination not upholding Mrs G's complaint.

4. Mrs G appealed the Deputy Ombudsman's Determination. In July 2015, Mrs G's appeal succeeded in the High Court[1] and the Deputy Ombudsman's Determination was set aside. Nugee J issued an order (the **First Order**) setting out what was required of NHS BSA. This said:

> "1. The appeal be allowed and the Determination of the Deputy Pensions Ombudsman dated 28.11.14 be set aside.
>
> 2. The matter be remitted to the NHS Business Services Authority for reconsideration on the basis of medical advice which shall take into account all medical evidence available at the date of instruction. The correct legal question for the NHS Business Services Authority to consider is whether the index injury of 16.02.10 was an operative cause of her Permanent Loss of Earning Ability."

5. NHS BSA appealed to the Court of Appeal. Its appeal was dismissed[2]. The Court of Appeal issued a further order (the **Second Order**) which said:

> "Re-assessment of the Respondent's claim for PIB is to proceed forthwith in accordance with the Court of Appeal's judgment and the judgment of Mr Justice Nugee in the court below … In the event of permission to appeal not

being sought, the Court of Appeal's judgment and the judgment of Mr Justice Nugee below shall be complied with in full …"

6. Summaries of and extracts from both judgments as they relate to Regulation 3 are provided in Appendix 1.

7. Following the Appeal Court's judgment, NHS BSA reconsidered Mrs G's application for a PIB. It issued a decision, on 16 May 2017, declining Mrs G's application. This investigation will only consider the 2017 decision; it does not reopen the previous investigations.

The National Health Service (Injury Benefits) Regulations 1995

8. The relevant regulations are the National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended) (the **Regulations**).

9. As at 23 July 2011, the date Mrs G's employment ceased, Regulation 3 provided:

"Persons to whom the regulations apply

(1) Subject to paragraph (3), these Regulations apply to any person who, while he -

(a) is in the paid employment of an employing authority; …

(hereinafter referred to in this regulation as "his employment"), sustains an injury, or contracts a disease, to which paragraph (2) applies.

(2) This paragraph applies to an injury which is sustained and to a disease which is contracted in the course of the person's employment and which is wholly or mainly attributable to his employment and also to any other injury sustained and, similarly, to any other disease contracted, if -

(a) it is wholly or mainly attributable to the duties of his employment; …

(3) These Regulations shall not apply to a person -

(a) in relation to any injury or disease wholly or mainly due to, or seriously aggravated by, his own culpable negligence or misconduct; …"

10. Regulation 4 provided:

"Scale of benefits

(1) … benefits in accordance with this regulation shall be payable by the Secretary of State to any person to whom regulation 3(1) applies whose earning ability is permanently reduced by more than 10 per cent by reason of the injury or disease.

(2) Where a person to whom regulation 3(1) applies ceases to be employed as such a person by reason of the injury or disease and no allowance or lump sum, other than an allowance under paragraph (5), has been paid under these Regulations in consequence of the injury or disease, there shall be payable, from the date of cessation of employment, an annual allowance of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6) will provide an income of the percentage of his average remuneration shown in whichever column of the table hereunder is appropriate to his service in relation to the degree by which his earning ability is reduced at that date ..."

11. Regulation 4 then set out the relevant percentages in a table of "Degree of reduction of earning ability" against Service. Degree of reduction of earning ability was divided into four levels: more than 10% but not more than 25%; more than 25% but not more than 50%; more than 50% but not more than 75%; and more than 75%. Service was also divided into four bands: less than five years; five years and over but less than 15 years; 15 years and over but less than 25 years; and 25 years and over.

The May 2017 decision

12. NHS BSA declined Mrs G's application for a PIB on the grounds that its medical adviser was not satisfied that the Index Injury was wholly or mainly attributable to her NHS employment. NHS BSA said it had not been necessary, therefore, to proceed to consider whether Mrs G's reported injury had been an operative cause of any PLOEA.

13. In its decision letter, NHS BSA quoted the advice it had received from its medical adviser. A summary of and extracts from the medical adviser's lengthy report are provided in Appendix 2.

Summary of Mrs G's position

14. It is submitted on Mrs G's behalf:-

- The outcome of the Court proceedings was that NHS BSA was required to reconsider Mrs G's PIB application. However, the Court remitted a specific question for NHS BSA to reconsider. Namely, "whether the index injury of 16.02.10 was an operative cause of [Mrs G's] Permanent Loss of Earning Ability"[3].

- NHS BSA has persistently, wilfully and illegitimately sought to change the terms of the remission. It has sought to treat the reconsideration as an opportunity to start from scratch and resist Mrs G's application on entirely different grounds.

[3] Paragraph 2 of Nugee J's sealed Order

- NHS BSA had previously conceded that Mrs G had suffered an injury which was wholly or mainly attributable to her NHS employment for the purposes of Regulation 3(2). See paragraphs 9 and 10 of the Court of Appeal's judgment.

- During Mrs G's previous appeals, the "matter in dispute" was whether, or to what extent, the Index Injury had caused a PLOEA. There was no challenge to the occurrence of the Index Injury.

- In 2013, the then Ombudsman directed NHS BSA to consider whether the Index Injury had caused a PLOEA of more than 10%. NHS BSA went on to do so and concluded that, on its own, the Index Injury had not caused a PLOEA of more than 10%. This is in contradiction to its claim, in 2017, that it cannot consider discrete questions relating to specific elements of the test for PIB entitlement.

- The Deputy Ombudsman's 2014 Determination was set aside. This only related to the "causation question". What is left is the reconsidered NHS BSA decision, of 25 March 2013, specifically on the causation question. This was to be reconsidered by applying the correct test of causation under Regulation 4(1).

- It is an established principle of law that a tribunal, which has otherwise extinguished its jurisdiction, only has its jurisdiction revived on a remittal following a successful appeal to the extent required by the scope of the remittal. See *Aparau v Iceland Frozen Foods Plc (No.2)* [2000] IRLR 196 (CA) para. 25 (**Aparau**).

- The Court of Appeal plainly intended that the question which should be put to NHS BSA's medical adviser was "whether the index injury of 16.02.10 was an operative cause of [Mrs G's] Permanent Loss of Earning Ability". Instead, the medical adviser was instructed to consider the legislative requirements of Regulation 3(2) and, if this was satisfied, to proceed to consider the legislative requirements of Regulation 4(1).

- As a result of NHS BSA refusing to ask the correct question, the advice provided is of no value. The medical adviser has not directed her/his mind to the correct issue properly or at all. S/he asked her/himself whether Mrs G's degenerative spinal condition was wholly or mainly attributable to her NHS employment. This is not the correct question.

- If it is accepted that it was open to NHS BSA to revisit the question of whether or not there had been a qualifying injury for the purposes of Regulation 3(2), the wrong test was applied. The correct question should have been whether or not there had been an index event involving a physiological or psychological change for the worse[4].

[4] *NHS v Suggett* [2005] EWHC 1265 (ch); on appeal [2006] EWCA Civ 10

- The immediate pain, which Mrs G experienced after bending to catheterise an obese patient in a low bed, was a physiological change for the worse. Pain is a physiological response. All of the relevant details were recorded in the original incident report and the NHS trust involved admitted liability in relation to a personal injury claim.

- Mrs G has never asserted that her degenerative spinal condition was caused by her NHS employment. Her case has always been that the Index Injury is an operative cause in that condition becoming symptomatic.

Summary of NHS BSA's position

15. NHS BSA submits:-

- It refutes the assertion that it has sought to change the terms of the remission by the Courts. It does not agree that it has exceeded the scope of its jurisdiction and maintains that it has complied with the relevant Court Orders.

- The First Order issued by Nugee J provided:

  "1. The appeal be allowed and the Determination of the Deputy Pensions Ombudsman dated 28.11.14 be set aside.

  2. The matter be remitted to the NHS Business Services Authority for reconsideration on the basis of medical advice which shall take into account all medical evidence available at the date of instruction. The correct legal question for the NHS Business Services Authority to consider is whether the index injury of 16.02.10 was an operative cause of her Permanent Loss of Earning Ability."

- It is clear that the effect of paragraph 1 is to set aside the November 2014 Determination in its entirety. There is no attempt to preserve any particular aspect or part of the Determination.

- Paragraph 2 directs the matter to be remitted to the NHS BSA for reconsideration "on the basis of medical advice which shall take into account all medical evidence available at the date of instruction". This direction necessarily requires NHS BSA to consider the matter afresh, having regard to all the medical evidence available at the date on which the matter is reconsidered. This includes the question of whether the requirements of Regulation 3(2) were satisfied because this is a preliminary question which must be satisfied before Regulation 4(1) comes into play.

- The First Order clearly directs it to take into account all medical evidence available. Therefore, the Scheme's medical advisers, on two occasions following the First and Second Orders, have taken into account all medical evidence available at the date of instruction. Two different medical advisers

have reached the conclusion that Mrs G has not satisfied the legislative requirements of Regulation 3(2). Therefore, it was not necessary to proceed to consider whether the requirements of Regulation 4(1) had been satisfied.

- *Aparau* supports its position that it cannot choose which elements of the application are settled and which elements it can consider as new. The Order requires NHS BSA to reconsider the whole of Mrs G's application afresh; which it has done.

- Its medical adviser was instructed to consider and address the following questions in order to determine whether the legislative requirements of the Regulations were satisfied:-

  (1) What is the applicant claiming?

  (2) Was there an injury sustained or disease contracted?

  (3) Was the injury sustained (or was the disease contracted)

  - In the course of the person's employment; and

  - Wholly or mainly attributable to his/her employment?

- If the answer to the second and third questions was 'yes', its medical adviser was instructed to consider and address the following:-

  (4) Whether the applicant has suffered a PLOEA of more than 10% by reason of the injury or disease.

- The questions put to the medical adviser are consistent with the proper construction of Regulation 3(2) as set out in *Stewart v NHS BSA* [2018] EWHC 2285 (Ch). The fourth question reflects the correct approach to Regulation 4(1) as clarified by the Courts.

- Determining whether there has been an injury and whether the injury is wholly or mainly attributable to NHS employment or the duties of that employment is, in the main, a matter of clinical judgment based on the evidence presented.

- It agrees that an injury is a physiological or psychological change for the worse. It is clear, from the rationale provided, that this is the test applied by its medical adviser.

- Medical advisers tasked with reconsidering an application are directed to form their views independently from those expressed by previous medical advisers who may have considered the case. The Ombudsman has previously acknowledged that medical advisers are entitled to reach different opinions based on the same evidence. See *PO-20249*.

- Having carried out a review of Mrs G's application, its medical adviser did not consider that she had sustained an injury which was wholly or mainly

attributable to her NHS employment. Therefore, the legislative requirements of Regulation 3(2) had not been met. It was not necessary for the medical adviser to proceed to consider whether the reported injury was an operative cause of any PLOEA which Mrs G may have suffered.

- The medical adviser also considered whether Mrs G's degenerative disease of the spine was wholly or mainly attributable to her NHS duties. S/he concluded it was not.

- It previously considered it incorrect to say that it had accepted that Mrs G was injured on 16 February 2010, and that the injury was wholly or mainly attributable to her NHS employment. It does now acknowledge that it previously accepted that Mrs G had sustained an injury which was wholly or mainly attributable to her NHS employment. At the time, the injury was identified by its medical adviser as a self-limiting soft tissue injury.

- Mrs G's application for a PIB has been considered on a number of occasions since 2011. In some instances, the incorrect question was addressed by the medical adviser considering the case at the time. The history of the decisions is as follows:-

15 September 2011	It did not accept that the legislative requirements of Regulation 3(2) were satisfied. The medical adviser rejected the application on the basis that Mrs G's ongoing medical condition was not wholly or mainly attributable to her NHS employment. S/he accepted that Mrs G had symptoms due to a soft tissue injury.
14 November 2011	It did not accept that the legislative requirements of Regulation 3(2) were satisfied. Its medical adviser concluded that the evidence was of someone vulnerable to injury because of constitutional degenerative changes; not someone who had structural damage to her spine caused by violent or serious injury.
16 April 2012	It accepted that Mrs G had sustained an injury which was wholly or mainly attributable to her NHS employment. Its medical adviser said Mrs G had been involved in an incident at work which had triggered an episode of pain. S/he said s/he did not mean that the episode was the cause of Mrs G's cervical spondylosis nor that it caused degenerative changes in her lumbar spine. The medical adviser was of the opinion that the incident, as described, could have caused some soft tissue strains to Mrs G's back and neck.
25 June 2013	Its medical adviser maintained the previous decision with regard to attribution. Although s/he did not give any

detailed consideration to Regulation 3(2), s/he would have been instructed to consider the whole of the application afresh.

- It would be perverse of the medical adviser to accept the previous medical adviser's recommendations when s/he is to look at the case independently and reach her/his own clinical opinion on the evidence presented.

- In considering an application for a PIB, it is first of all necessary to identify the injury or disease in question. Then it is necessary to determine whether the NHS employment was the whole or main reason for the injury being sustained or the disease contracted. It does not agree that the incorrect test has been applied under Regulation 3(2).

- The fact that an incident took place on 16 February 2010, and Mrs G developed symptoms following the incident is not in doubt. However, the clinical conclusion reached is that Mrs G's had degenerative changes in her spine at the time and she experienced symptoms from these changes. Its medical adviser concluded that the injury was an exacerbation of symptoms resulting from Mrs G's degenerative disc disease. The claimed injury was not an injury which was wholly or mainly attributable to her NHS employment.

- The inclusion of the words "wholly or mainly" in Regulation 3(2) from April 1998 provided for a stricter test of causation. It includes the possibility of more than one cause, but the NHS employment must be more than 50% of the cause. This does not mean that a pre-existing condition will preclude an application for a PIB from succeeding. However, the NHS employment would have to be the whole or main cause of the injury sustained or disease contracted.

- Its medical adviser addressed the issue of the clinical opinions provided previously and whether the awkward position adopted by Mrs G in February 2010, had caused a soft tissue strain. S/he confirmed that there was no evidence of a soft tissue strain occurring. Even if it was accepted that a soft tissue injury occurred, which was wholly or mainly attributable to Mrs G's NHS employment, its medical adviser was of the opinion that any effects would be self-limiting. Recovery would have been expected within a few months of the incident.

- It is good practice to seek the opinion of a different medical adviser when considering an application under the IDR procedure. It extends this good practice to consideration of a case following legal proceedings.

- It was, therefore, necessary for the medical adviser to consider the application afresh in order to provide a recommendation as to eligibility for a PIB.

- It was necessary, in Mrs G's case, for the medical adviser to accept that the Regulation 3(2) requirements had been met in order to proceed to consider the

question which the First Order had clarified. To do otherwise would be perverse.

- It would be difficult to understand how a medical adviser who has had no prior involvement with an application could consider the requirements of Regulation 4 if they do not consider the whole application afresh. It is important that they identify and understand the injury for which the application has been made.

- The Deputy Pensions Ombudsman has previously had no issue with its medical adviser reaching a different conclusion in respect of Regulation 3(2)[5].

- Following the Second Order, its medical adviser did address the question of whether Mrs G had suffered a PLOEA by reason of the injury; if it was accepted that she had sustained a soft tissue injury on 16 February 2010. The medical adviser said[6]:

  "If one does regard the qualifying injury in this case to be the presumed soft tissue injuries referred to in the report of 21 March 2012, it is pertinent to note that … any such changes would be self-limiting and have recovered within, at most, a few months of the incident. I would not expect any such soft tissue injuries to give rise to any long term adverse consequences. I think it is clear from the report of 21 March 2012 that the author considered [Mrs G's] ongoing symptoms to be the result of the degenerative changes in her spine and that the postulated soft tissue injuries did not give rise to any PLOEA. Therefore, even if one did prefer his view that [Mrs G] sustained a soft tissue injury in the incident, the application would fail as such an injury would not be an operative cause of [Mrs G's] PLOEA."

- It maintains that it has complied with the terms of the First Order in that it has reconsidered Mrs G's application on the basis of medical advice which takes into account all medical evidence available at the date of instruction.

16. NHS BSA further submits:-

- Regulation 13(2) does not help to resolve the matter which is in dispute in this case. The current disagreement concerns the proper construction of the First and Second Orders in this specific case. It would clearly not be necessary to review the original question of whether Regulation 3(2) was satisfied in the context of a provision which provides for subsequent assessments as to whether there has been a further reduction in PLOEA. The provision assumes that the requirements of Regulation 3(2) have been met.

- Regulation 13(2) stipulates: "in consequence of a *further* reduction by reason of the injury or disease …" (emphasis added). This clearly indicates that there

[5] PO-23188
[6] Quoted in NHS BSA's second stage IDR response dated 12 March 2018.

must have been a reduction in earning ability in the first place by reason of the injury or disease; albeit of less than 10%.

- The medical adviser would need to understand and identify the injury for which Regulation 3(2) has been met in order to consider whether there has been a further PLOEA by reason of the injury or disease. It would be odd if there was a requirement to reconsider whether Regulation 3(2) had been satisfied in the first place because it can be assumed that it must have been in order for there to have been an initial assessment of PLOEA.

- *Metropolitan Police Authority v Laws* [2010] EWCA Civ 1099 is not relevant. The Scheme Regulations do not provide for statutory periodical reviews of a claimant's degree of disablement.

- Throughout the application, legal and IDR process, it has not accepted that Mrs G is entitled to a PIB. This is, therefore, not a case concerned with the reassessment of an injury or disability which has already been accepted as giving rise to an entitlement to benefits under the Scheme Regulations.

- It maintains that the reason Mrs G's application was unsuccessful was because the requirements of Regulation 3(2) have not been met. This decision has been made following consideration of all medical evidence available by the Scheme's medical advisers on two separate occasions following the legal proceedings.

- At stage two of the IDR procedure, the medical adviser said: "if one did prefer his view that [Mrs G] sustained a soft tissue injury in the incident …". This was a theoretical conclusion and not based on clinical facts. The medical adviser has clearly explained that there is no medical evidence to demonstrate that Mrs G sustained a soft tissue strain. The medical adviser was addressing and explaining why his clinical opinion was different to that of the medical adviser who had previously accepted that Mrs G had sustained a soft tissue strain as the qualifying injury.

- It disagrees that it is now looking to unpick earlier parts of the Regulations or issues not before the Deputy Ombudsman or either Court. The Scheme's medical adviser has simply reassessed the application in line with the First and Second Orders. Those Orders required the consideration of the whole of the application afresh, including whether the Regulation 3(2) requirements were satisfied.

- The Scheme's medical advisers have provided recommendations and rationales based on all the medical evidence and the facts of the case at the date of instruction. As Scheme administrator, it cannot disagree with a medical adviser's expert clinical opinion unless there is a compelling or cogent reason to do so.

Conclusions

17. Mrs G's position is, essentially, that NHS BSA has exceeded the terms of the First and/or Second Order in seeking to reach a fresh decision as to whether she meets the pre-conditions for claiming a PIB, as set out in Regulation 3(1) and 3(2).

18. In the First Order, Nugee J said, Mrs G's appeal was allowed and the Deputy Pensions Ombudsman's Determination was to be set aside. He said "the matter" was to be remitted to NHS BSA for reconsideration on the basis of medical advice which should take into account all medical evidence available at the date of instruction. Nugee J also said that the correct legal question for the NHS BSA to consider is whether the Index Injury of 16 February 2010, is an operative cause of Mrs G's PLOEA.

19. This raises the question as to what is meant by "the matter" which has been remitted to NHS BSA for reconsideration. Mrs G argues that it is simply whether the Index Injury of 16 February 2010 is an operative cause of her PLOEA. NHS BSA take the view that it is the whole question of whether Mrs G is eligible for a PIB, including whether she meets the Regulation 3 "pre-conditions".

20. The Second Order issued by the Court of Appeal said "re-assessment" of Mrs G's claim for PIB was to proceed forthwith "in accordance with the Court of Appeal's judgment and the judgment of Mr Justice Nugee in the court below". This is helpful because it indicates that the First and Second Orders are not intended to be read in isolation. The First and Second Orders are the end-products of a lengthy legal process and intended to put into effect the conclusions reached by the Courts.

21. It is clear that both Courts proceeded on the basis that the parties had agreed that Mrs G met the Regulation 3 pre-conditions. Nugee J (at paragraphs 13 to 15) said:

> "In the present case, the position that has now been reached is that quite a lot of the pre-conditions for claiming benefit are common ground … It is not now disputed that, for the purposes of regulation 3(1), she sustained an injury, namely the injury which she sustained on 16 February 2010, and that, for the purposes of regulation 3(2), that injury was sustained in the course of her employment, and was wholly or mainly attributable to her employment.
>
> The pre-conditions of regulation 3(1) and 3(2) are therefore now accepted to be satisfied. The argument has centred on regulation 4(1) … regulation 4(1) provides that benefit 'shall be payable … to any person to whom regulation 3(1) applies' and, as I say, that is not in dispute …"

22. The Court of Appeal (at paragraphs 10 and 11) said:

> "That acceptance by the Authority that the pre-conditions of regulation 3 are satisfied, because the injury which [Mrs G] sustained on 16 February 2010 was sustained in the course of her employment and was wholly or mainly attributable to her employment, was maintained before us by Mr Andrew

> Hogarth QC on behalf of the Authority in his submissions to us and in a letter to the Court after the hearing.
>
> In the circumstances, … the argument centred on regulation 4(1) and, specifically, the meaning and scope of the words: 'by reason of the injury' …"

And at paragraph 24:

> "… once it is accepted, as it is in the present case, that the injury suffered by [Mrs G] on 16 February 2010 was wholly or mainly attributable to her employment, so that the pre-conditions of regulation 3 are satisfied …"

23. The following paragraphs of the Court of Appeal judgment are concerned with the correct construction of Regulation 4. I note the decision timeline provided by NHS BSA, but the decisions referred to all pre-date the Court hearings.

24. On that basis, the "matter" which was before the Courts was the correct construction of Regulation 4. NHS BSA has previously pointed out that the Courts were only concerned with the construction of Regulation 4[7]. This would suggest that the matter which Nugee J was referring to in the First Order was whether Mrs G met the requirements of Regulation 4. This sits comfortably with the instruction that the correct legal question is whether the Index Injury, of 16 February 2010, is an operative cause of Mrs G's PLOEA.

25. It also sits well with the judgments themselves; both of which start from the position that it was common ground that Mrs G met the Regulation 3 pre-conditions. The fact that the Second Order instructed NHS BSA to re-assess Mrs G's claim for a PIB "in accordance with" the judgments suggests that it was to take the same or a similar approach as the Courts had done. This would mean starting from the position that Mrs G met the Regulation 3 pre-conditions.

26. The instruction to take account of all medical evidence available at the date of instruction cannot be read in isolation. The matter which is to be reconsidered by NHS BSA is whether Mrs G meets the requirements of Regulation 4. It follows that the medical advice referred to is intended to address that matter. It should not be taken to mean that the medical adviser is required to consider the Regulation 3 pre-conditions. NHS BSA simply has to ask its chosen medical adviser to address the question of whether the Index Injury of 16 February 2010 is an operative cause of Mrs G's PLOEA. The medical adviser is to take account of all medical evidence available at the date of instruction, but this does not necessitate taking a view on the Regulation 3 pre-conditions.

27. NHS BSA has focussed on the first sentence of paragraph 2 of the First Order. It insists that the instruction to take account of all medical evidence available at the date of instruction means its medical adviser must revisit the Regulation 3 pre-conditions. It appears to overlook the second sentence of paragraph 2 which states that the

[7] PO-10414

correct legal question for NHS BSA to consider is "whether the index injury of 16.02.10 was an operative cause of her Permanent Loss of Earning Ability." This clearly indicates that the First Order is given on the basis that Mrs G sustained an index injury on 16 February 2010. It is not open to NHS BSA or its medical advisers to find otherwise.

28. NHS BSA has suggested that it could not consider Regulation 4 in isolation. However, the Regulations call for a two-step process. The first step is to determine whether or not the applicant meets the Regulation 3 pre-conditions, before moving on to the second step of deciding whether or not they meet the Regulation 4 PLOEA test. There appears to be nothing in the Regulations which requires NHS BSA to return to the starting point each time if its decision under Regulation 4 is challenged or amended.

29. I note that Regulation 13 provides for the review and adjustment of allowances. It allows the Secretary of State to review "the **amount of** an allowance" (emphasis added) in the light of a further reduction of the person's PLOEA. It also allows for a person to begin to receive an allowance if they had previously not been entitled to "by reason only that his earning ability was not permanently reduced by more than 10 per cent". Regulation 13 does not provide for nor require NHS BSA to revisit its decision under Regulation 3. This indicates that a decision under Regulation 4 can be taken without there being any need, or power, to revisit a preceding decision under Regulation 3. Any medical advice sought or given under Regulation 13 would be on a similar basis to that envisaged by the First Order.

30. NHS BSA takes the view that Regulation 13 does not assist in determining Mrs G's complaint. It points out that Regulation 13 applies where a reassessment of a PLOEA is required. It says there is no necessity to review the original question as to whether the Regulation 3 pre-conditions were met; Regulation 13 assumes the Regulation 3 pre-conditions have been met. NHS BSA has missed the point. If its medical adviser can proceed on the assumption that the Regulation 3 pre-conditions have been met in order to carry out a Regulation 13 review, s/he can proceed on the same assumption in assessing Mrs G under Regulation 4(1) for the purposes of the First Order.

31. NHS BSA has pointed out that the First Order set aside the Deputy Ombudsman's Determination in its entirety. I agree but I cannot see that this supports an argument that NHS BSA is thus required to revisit its decision under Regulation 3. The Deputy Ombudsman's Determination had concerned the question of whether Mrs G's injury on 16 February 2010, had resulted in a PLOEA of more than 10%. Setting aside that decision, on the basis that the Deputy Ombudsman had misdirected herself as to the correct construction of Regulation 4, does not undo any decision by NHS BSA under Regulation 3. It simply undid the Deputy Ombudsman's decision that NHS BSA had been correct in its application of Regulation 4.

32. During the course of my investigation into Mrs G's complaint, NHS BSA acknowledged that it had previously accepted that Mrs G had suffered an injury which

was wholly or mainly attributable to her NHS employment. Given that the Deputy Ombudsman's Determination dated 28 November 2014, and both the High Court and Court of Appeal cases proceeded on that basis, indeed with NHS BSA confirming so, I think it would be difficult to say otherwise.

33. Nevertheless, NHS BSA maintains that it was required, by the First Order, to start afresh with Mrs G's case; that is, its medical adviser was required to address the question of whether Mrs G met the Regulation 3 pre-conditions. I do not find that to be so.

34. It is clear that the Regulations do envisage circumstances when NHS BSA, and by extension its medical advisers, need only consider the requirements of Regulation 4; without revisiting Regulation 3. I have referred above to Regulation 13, which clearly envisages this when it provides for NHS BSA to consider whether an individual should receive a PIB when s/he had previously not been entitled to only because her/his earning ability was not permanently reduced by more than 10 per cent. In order to do so, NHS BSA would need only consider whether the individual's PLOEA was now more than 10 per cent.

35. The basis of NHS BSA's argument is that its medical adviser cannot answer the question "whether the index injury of 16.02.10 was an operative cause of [Mrs G's] Permanent Loss of Earning Ability" without revisiting the Regulation 3 pre-conditions. It argues that the medical adviser has to identify and understand the injury for which the application has been made. I can see some merit in this argument and it would not be appropriate to ask a medical practitioner to comment on a condition s/he did not fully understand.

36. However, I think it is stretching things too far to suggest that a medical adviser is unable to answer the Regulation 4 question without going right back to beginning and starting afresh.

37. The NHS is not unique among the public services in offering its employees some form of injury benefit. Many of the schemes in question include provision for a PIB to be reviewed once in payment. The Courts have found that such a review does not, of necessity, allow for the paying authority to re-visit the first instance decision on qualification; rather the paying authority is simply to consider whether the individual's degree of disablement has altered[8]. If this is so, it must be considered possible for the medical practitioners called upon to give advice in such cases to do so without starting afresh. The situation is not so different for Mrs G.

38. NHS BSA does not agree that a comparison with other public sector schemes is relevant. Again, it argues that Mrs G's case does not concern the reassessment of an injury or disability which has already been accepted. Again, it has missed the point. If the medical practitioners providing advice for such schemes are able to proceed on the basis that the original decision is not to be revisited, it must be possible for the

[8] *Metropolitan Police Authority v Laws* [2010] EWCA Civ 1099

medical practitioners advising NHS BSA to proceed on a similar basis. There is no absolute necessity for a medical practitioner to return to the beginning of a case each time s/he is called upon to given advice.

39. NHS BSA informed Mrs G that it was declining her application because its medical advisor did not consider her to have sustained an injury which was wholly or mainly attributable to her NHS employment. It appeared to step back from this position and argue that its medical adviser did consider the effects of the February 2010 injury and advised they would not have been permanent. It now says that this was a theoretical conclusion and not based on the clinical facts.

40. I accept that there was reference to the effects of the February 2010 injury in the medical adviser's report at stage two of the IDR procedure; albeit on the basis that s/he did not her/himself accept that such an injury had even occurred. This might be evidence that the medical adviser gave some consideration to the effect of the February 2010 injury, but it is not evidence that NHS BSA did so. Its May 2017 decision, and subsequent IDR responses, have all been premised on the view that Mrs G had not sustained an injury which was wholly or mainly attributable to her NHS employment.

41. It may be that NHS BSA now wishes to decline Mrs G's application on the basis that the February 2010 injury was a soft tissue injury of limited duration. However, this is not the reason it gave Mrs G in May 2017. It is not the basis upon which she was told her application had been unsuccessful and upon which she prepared her appeal and consequent complaint to my Office. I do not find that it would be appropriate to allow NHS BSA to, in effect, amend its reason for declining Mrs G's application retrospectively. To do so would deny Mrs G an opportunity to appeal the decision while in possession of the necessary information and could be said to be an abuse of process.

42. I find that Mrs G's complaint shall be upheld because NHS BSA has asked its medical adviser the wrong question. It should have asked its medical adviser simply whether the Index Injury of 16 February 2010, as it stood, is an operative cause of Mrs G's PLOEA.

43. I am not expressing a view as to Mrs G's eligibility for a PIB. That remains for NHS BSA to determine in accordance with the Court judgments. I note that Nugee J said:

> " … the question that should have been asked was not what impact the injury would have had on a woman of [Mrs G's] age who did not suffer from degeneration of the spine, but what impact it had on [Mrs G], given her pre-existing condition. **It by no means follows that the injury will have been an operative cause at all of the permanent loss of earning capacity**. It may be … that the impact of the injury was something that, even for [Mrs G], had no lasting or permanent effect, and that the lasting or permanent effect was entirely attributable to her pre-existing condition. But it does seem to me that

> … that question has not been asked and has not been answered." (emphasis added)

44. It is of course open to NHS BSA to appeal my Determination to the High Court. NHS BSA would then have to demonstrate to the Court that it has given proper consideration to the Second Order, which was of course the end of a lengthy appeal process culminating in the Court of Appeal; and it has acted in accordance with the Court's intentions. A process which took significant time and costs for all parties involved, as well as the Court. No doubt if NHS BSA does appeal my Determination then the Court will note the previous submissions made by NHS BSA, most notably during the Court of Appeal hearing (and afterwards by way of written submissions), that NHS BSA accepted and reaffirmed its position that the pre-conditions of Regulation 3 were satisfied and were therefore not in issue between it or Mrs G (nor indeed had they been when the Deputy Ombudsman determined Mrs G's original complaint in 2014).

45. It is clear to me that the Court had this in mind when giving judgment on Mrs G's case, which centred entirely on the interpretation of Regulation 4. By NHS BSA now looking to unpick earlier parts in the Regulations and issues not before the Deputy Ombudsman or either Court, it is effectively looking to go behind the Court of Appeal decision. This cannot be correct and it is clear to me that NHS BSA has not asked itself the correct question, as remitted by the Court, when considering Mrs G's case. That is, whether the Index Injury of 16 February 2010 was an operative cause of [Mrs G's] Permanent Loss of Earning Ability. This has been a long and distressing process for Mrs G; albeit one during which she has benefitted from the support of her union. For NHS BSA to have taken the stance which it did in May 2017 has unnecessarily prolonged the appeal process for Mrs G and I find that she shall receive compensation for the exceptional non-financial injustice this will have caused her.

46. I have considered *Aparau* but I cannot see that it assists either party. The case concerned the extent to which an Employment Tribunal's jurisdiction is revived in consequence of an order remitting a matter to it when its jurisdiction has previously been exhausted. The Court of Appeal found that the tribunal would have no jurisdiction to hear or determine matters outside of the scope of the issues remitted to it. It could not reopen the case generally, nor allow either party to amend a Notice of Appearance, as it had been requested and agreed to do.

47. It would be a stretch to apply the same principles to decisions made by NHS BSA under the Regulations. NHS BSA is not acting as a tribunal. Its authority to make decisions arises from the Regulations and it is required to apply them to the case before it.

Directions

48. Within 28 days of the date of this Determination, NHS BSA shall consider whether Mrs G meets the requirements of Regulation 4 by reference to the injury she

sustained in February 2010. It shall provide Mrs G with a reasoned decision and allow her full appeal rights if she disagrees with that decision.

49. Within 14 days of the date of this Determination, NHS BSA shall pay Mrs G £3,000 for exceptional non-financial injustice arising as a consequence of its failure to properly address the question which had been returned to it by Nugee J.

Anthony Arter
Pensions Ombudsman

1 June 2020

Appendix 1

Young v NHS BSA [2015] EWHC 2686 (Ch)

50. This was the appeal from the then Deputy Ombudsman's Determination of 28 November 2014.

51. Having set out a background to the case before him, Nugee J said:

> "In the present case, the position that has now been reached is that quite a lot of the pre-conditions for claiming benefit are common ground. It has never been disputed that Mrs Young is a person who was in the paid employment of an employing authority. It is not now disputed that, for the purposes of regulation 3(1), she sustained an injury, namely the injury which she sustained on 16 February 2010, and that, for the purposes of regulation 3(2), that injury was sustained in the course of her employment, and was wholly or mainly attributable to her employment.
>
> The pre-conditions of regulation 3(1) and 3(2) are therefore now accepted to be satisfied. The argument has centred on regulation 4(1). As appears from the text, regulation 4(1) provides that benefit 'shall be payable by the Secretary of State to any person to whom regulation 3(1) applies' and, as I say, that is not in dispute, 'whose earning ability is permanently reduced by more than 10 per cent' … it is common ground before me that Mrs Young's earning ability has been 100 per cent reduced because she is unable to work at all.
>
> The remaining requirement is found in the last few words of regulation 4(1) which is that the permanent reduction of earning ability is 'by reason of the injury' …"

52. Nugee J then moved on to consider Regulation 4(1) and (2) in detail. He concluded by saying:

> "… I find that the appeal succeeds and that the Determination of the Deputy Pensions Ombudsman should be set aside. It is open to me to direct, which I will do, that the matter be remitted to NHS BSA to consider the question on the basis of medical advice, in accordance with this judgment. It should be pointed out … that, under regulation 4, not only is it a requirement that the permanent reduction in earning ability is 'by reason of the injury', it also has to be, under regulation 4(2), that the applicant ceases to be employed by reason of the injury and it may be that that is a question that should be considered at the same time. The words 'by reason of the injury' obviously mean the same in both parts of regulation 4."

53. Nugee J subsequently issued the First Order (see paragraph 6 above).

54. The grounds of appeal were as follows:-

- The DPO had misapplied regulations 3 and 4 of the NHS (Injury Benefits) Regulations 1995 in upholding NHS BSA's reconsidered decision because the advice from its medical adviser asked and answered the wrong question in law as to causation of Mrs Young's 100% PLOEA;
- The DPO had failed to consider whether the index injury accelerated or exacerbated Mrs Young's underlying condition so as to contribute to her current 100% PLOEA by at least 10%;
- It was perverse for the DPO to accept that the index injury made a 0% contribution to Mrs Young's 100% PLOEA.

55. In its analysis of Nugee J's judgment, the Court of Appeal noted that he had recorded that a lot of the pre-conditions for claiming a PIB were common ground. It quoted the paragraphs set out in paragraph 31 above and said:

> "That acceptance by the Authority that the pre-conditions of regulation 3 are satisfied, because the injury which Mrs Young sustained on 16 February 2010 was sustained in the course of her employment and was wholly or mainly attributable to her employment, was maintained before us …"

56. In its summary of the parties' submissions, the Court of Appeal said:

> "As we have already noted, in his submissions before us on behalf of the Authority, Mr Hogarth QC accepted that the injury or strain sustained on 16 February 2010 was: 'wholly or mainly attributable to [Mrs Young's] employment', so the pre-conditions of regulation 3 were satisfied. However, the underlying disease from which she suffers, the degenerative condition of the spine, was not attributable to her employment. He submitted that, on the correct construction of regulation 4(1), Mrs Young should not be entitled to PIB because it was that degenerative condition which was the operative cause of her PLOEA not the injury or strain which occurred on 16 February 2010."

57. The Court of Appeal concluded:

> "In my judgment, once it is accepted, as it is in the present case, that the injury suffered by Mrs Young on 16 February 2010 was wholly or mainly attributable to her employment, so that the pre-conditions of regulation 3 are satisfied, the judge's construction of regulation 4 must be correct.

58. The rest of the analysis and conclusions related to the construction of regulation 4.

59. The Court of Appeal subsequently issued the Second Order (see paragraph 5 above).

Appendix 2

NHS BSA's Medical Adviser's Opinion 2017

60. The medical adviser began by setting out the provisions of Regulation 3. S/he referred to question (1): "What is the applicant claiming?". S/he said that Mrs G had made a claim for: "lower back and neck pain, neck spasms, weakness and tingling in the hands and legs". The medical adviser noted that Mrs G had stated that the injury had occurred on 16 February 2010 at 04:30 hours, when attending a patient. S/he noted that Mrs G had stated that, on 30 November 2009, she had complained of hurting her back, but that she had not completed an accident form. The medical adviser noted that Mrs G had referred to further instances of pain on visiting the patient between November 2009 and February 2010.

61. The medical adviser then moved on to question (2): "Was there an injury sustained or a disease contracted?". S/he summarised various documents dating from February 2010 to July 2011. In particular, the medical adviser pointed out what s/he considered to be inconsistencies within the evidence presented. For example, where Mrs G had been reported as suddenly developing severe neck and back pain; whereas other records showed that she had continued in work and had been able to drive home. The medical adviser concluded:

> "In this case, it is not accepted that [Mrs G] sustained an injury, where this is defined as an index event which led to a physical or psychological change for the worse. It can be said that she noticed pain whilst at work (on more than one occasion), but there is insufficient evidence that this occurred due to any specific injurious event or events. The tasks she completed at work on the days she felt pain were tasks she must have completed many times, and there was no specific violence or other factor which would lead to the conclusion that they were done in such a manner as to cause any injury to the spine.
>
> I have concluded that [Mrs G] did not injure her back at work, in the same way that if her back pain had first commenced when watching a film or when walking outdoors it would not be appropriate to attribute degenerative disease of the back to an injury sustained sitting watching a film or walking outdoors. It is accepted that she had pain whilst working but this does not lead naturally to the conclusion that she suffered an injury to the spine.
>
> In my view, the pain arose due to a disease, which caused typical pain symptoms when she stretched, bent and moved her spine in the normal way to its full extent at work. These symptoms could have occurred during any activity which stretched and moved the spine to its normal extent, either at work or at home. The pain is concluded to have been a symptom of her degenerative disease alone. It is understandable that, when [Mrs G] felt pain, she must have worried that something she had done that day had caused an injury, because this is how society tends to view the development of a painful condition, by attributing symptoms of the disease to injurious events that

> occurred immediately preceding the pain. This is an unsatisfactory model for the many degenerative conditions which develop silently and gradually over time but which may make themselves evident quite suddenly, such as heart disease causing a first episode of angina pain, cerebrovascular disease causing a stroke event or in this case, degenerative disease causing significant low back and neck pain.
>
> In this case, it can be accepted that [Mrs G] has contracted a disease which is widespread degenerative change of the spine. The ICD 10 code for this condition is M47.8. It is accepted that this has developed in the neck and lower back and that this disease is the cause of the symptoms she has claimed …"

62. The medical adviser then considered question (3): "Was the injury sustained (or was the disease contracted) (a) in the course of the person's employment and (b) wholly or mainly attributable to his/her employment?".

63. The medical adviser noted that Mrs G had been a nurse for decades and that there was no evidence indicating that she suffered from degenerative disease of the spine prior to starting her training. S/he said this disease developed gradually over a long period of time. S/he said, if the definition of "in the course of the person's employment" was given its widest meaning so that it meant "during the period from commencement of employment until the last day at work in the NHS", the answer to question 3(a) must be "yes"; the disease first became symptomatic whilst at work.

64. The medical adviser then considered question 3(b). S/he said s/he had considered whether the index events described would, of themselves, have been sufficient to make the disease Mrs G had contracted become symptomatic when it would otherwise have remained asymptomatic. The medical adviser said, in such circumstances, it would be possible to conclude that the index events had a causative role in Mrs G's degenerative disease or the incapacity arising from it. S/he said s/he had also considered whether the index events could have made Mrs G's symptoms worse that they might naturally have been. S/he said s/he had considered whether Mrs G's NHS duties as a whole could be considered to have caused her degenerative disease.

65. The medical adviser said:

> "It is accepted that the applicant felt pain in the back whilst nursing this patient on at least three occasions, in November, December and February. No particular twist, bend, fall, assault, jerk or any untoward movement was reported. Moving awkwardly in a confined space was noted. The patient was obese. On the last date she did this task, the patient's legs were supported by a colleague. She may have felt pain whilst doing her nursing duties (or may have felt pain in the car later when sitting, as claimed in the second incident report). She remained fit for work on the day when she developed back pain in February 2010. She drove home. Two days later her back pain was sufficiently

severe that she reported sick and her husband drove her home from work. [Mrs G] did not seek medical attention until 23/2/10. She did not report neck pain on the first incident form or to her GP contemporaneously. The first report of neck pain is five weeks after she finished work. The GP record suggests leg pain came on after the back pain.

It is accepted that her spinal disease first became symptomatic in the low back area when undertaking nursing tasks in November and December 2009 and February 2010. Neck pain occurred soon after, by late March, when she was already absent from work …

Considering all of the evidence, it is accepted that degenerative disease of the spine caused symptoms in the low back, which first manifest themselves whilst on duty. On the date of the claimed injury, there is doubt as to whether this was whilst she was nursing or whilst she was in the car thereafter but it can be accepted it occurred whilst she was at work and in the course of her NHS duties. It is clear from the accounts that little or no physical force occurred to the extent that there is doubt as to whether she was sore at the time or sore later in the car. She had reported low back pain symptoms on previous visits to this patient.

Symptoms in the neck are not accepted to have developed in the course of her NHS duties but developed whilst absent from work …

Had there been a jerk, unusual movement, fall, assault or other untoward or unusual event whilst she was doing her nursing task, it might be possible to conclude that she might have suffered an acute trauma, sufficient to inflict damage to the spine in someone with a pre-existing vulnerable spine. In this case, it would have meant that significant damage had occurred as a direct immediate consequence of at most a minor event with no evidence of direct trauma or torsion of the spine. This is unlikely to have occurred, because medical evidence indicates that usually a substantial trauma is needed to damage the spine, and usually this would be at one level of spinal disc alone. This is the case, even where an individual is known to have a vulnerability to spinal symptoms …

Had [Mrs G] reported sudden severe back pain, been unable to walk, gone off sick at the time, called an ambulance, attended Accident and Emergency or similar, these would be evidence more in favour of such an acute event having occurred … Instead, [Mrs G] reported the same symptoms occurred on previous visits and she remained at work for two days. The description of the development of symptoms over repeated visits over months points to a more insidious onset of symptoms due to progressive, structural problems in the spine, rather than of an injury occurring on 16th February …

The fact that her neck became symptomatic in March some five weeks or so later whilst absent from work in my view adds further weight to the conclusion

> that her lumbar spinal degenerative disease caused symptoms at work in late 2009 because it had simply reached the point where it would be expected to cause symptoms, irrespective of any injury or incident …
>
> It can be concluded that the index events claimed … did not cause any significant change in her physical health; back pain is considered to have occurred as a gradual, progressive onset of symptoms … It was in the natural course of the condition that pain would be increasingly noticed when crouching and bending, due to the site of the facet joint disease … it was inevitable that at some point her pain would be sufficient to make her absent from work as a consequence …
>
> The "eggshell skull" principle does not appear to apply in this case, because the "eggshell skull" can be accepted where the person would have remained well and asymptomatic but for a trauma to a particularly vulnerable area. Looking at the extent of degenerative change to the spine demonstrated on the MRI scan I conclude that she was undoubtedly going to have become symptomatic … and no trauma was necessary for this to occur …"

66. The medical adviser said s/he had considered whether Mrs G's NHS duties as a whole, over the period of her working lifetime, were the whole or main cause of her degenerative disease. S/he noted that the GP records indicated one episode of back pain in 1994 but it was not clear how significant this was. The medical adviser said it was likely that Mrs G developed her degenerative disease during the period of her employment as a nurse. The medical adviser then provided a detailed discussion of various research studies.

67. In answer to the question as to whether Mrs G's degenerative disease of the spine was wholly or mainly attributable to her NHS duties, the medical adviser said:

> "It is not accepted that [Mrs G's] degenerative disease of the spine (M47.8) arose wholly or mainly due to her NHS duties. In this case, the work duties are not considered to have caused, accelerated or aggravated her disease or precipitated absence from work at a point in her career where she would otherwise have been fit to continue to work, based upon all of the evidence and on current medical understanding of the factors that cause degenerative disease of the spine."